Supreme Court, U.S.
FILED
MAR 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1315

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

THE HOSPITAL AUTHORITY OF
GWINNETT COUNTY, GEORGIA,
Individually and d/b/a
GWINNETT AMBULANCE SERVICES,
Petitioner,

v.

R. STANFORD JONES, Administrator of the Estate
of WILLIAM HAROLD O'KELLEY, Deceased,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA**

BRIEF IN OPPOSITION

*Robert D. Cheeley
James E. Butler, Jr.
Butler, Wooten, Overby
& Cheeley
Resurgens Plaza
Suite 1790
945 East Paces Ferry Road
Atlanta, Georgia 30326
(404) 237-9660

Attorneys for Respondent

**Counsel of Record*

CASILLAS PRESS INC. - 1717 K STREET NW WASHINGTON DC 20036 - 223-1220

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

STATEMENT OF CASE 1

I. Introduction 1

II. Facts 3

REASONS WHY THE PETITION SHOULD BE DENIED ..7

I. Due Process Argument 7

A. The Threshold Standard for the Award of Punitive Damages Is Not Unconstitutionally Vague 7

B. The Standards Limiting the Size of Punitive Damages Awards Are Proper in Conception and Clear in Legal Formulation 11

II. Equal Protection Argument 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES Page

Browning-Ferris Industries v. Kelco Disposal, Inc.,
_____ U.S. _____, 109 S.Ct. 2909 (1989) 15, 16

Colonial Pipeline Co. v. Brown,
258 Ga. 115, 365 S.E.2d 827 (1988) 15

Deal v. Byford,
537 N.E.2d 267 (Ill. 1989) 13

Downey Savings & Loan Ass'n. v. Ohio Casualty Ins. Co.,
189 Cal. App.3d 1072, 234 Cal. Rptr. 835 (1987) 17

Hospital Authority of Gwinnett County v. Jones,
259 Ga. 759, 386 S.E.2d 120, (1989) 7, 11, 14

Moore v. Thompson,
255 Ga. 236, 336 S.E.2d 745 (1985) 13

New York Times v. Sullivan,
376 U.S. 254 (1964) 2, 9

Olson v. Walker,
781 P.2d 1015 (Ariz. App. 1989) 17

Palmer v. A.H. Robins Co., Inc.,
684 P.2d 187 (1984) 14

Rescue Army v. Municipal Court of Los Angeles,
331 U.S. 549 (1947) 2

Smith v. Wade,
461 U.S. 30 (1983) 10

Socialist Labor Party v. Gilligan,
406 U.S. 583 (1972) 2

Page

Sturm, Roger & Co. v. Day,
594 P.2d 38 (Alaska 1979) 17

Unified School Dist. No. 490 v. Celotex Corp.,
6 Kan. App.2d 346, 629 P.2d 196 (1981) 17

Village of Hoffman Estates v. Flipside,
455 U.S. 489 (1982) 8

Wainwright v. Sykes,
433 U.S. 72 (1977) 3

STATUTES

O.C.G.A. § 5-5-20 14

O.C.G.A. § 51-12-1 2

O.C.G.A. § 51-12-5 ..... 6, 8, 11, 12

O.C.G.A. § 51-12-5.1 2

O.C.G.A. § 51-12-5.1(b) 10

O.C.G.A. § 51-12-12 ..... 2, 12, 14

28 U.S.C. § 2254 3

42 U.S.C. § 1983 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE HOSPITAL AUTHORITY OF
GWINNETT COUNTY, GEORGIA,
Individually and d/b/a
GWINNETT AMBULANCE SERVICES,
Petitioner,

v.

R. STANFORD JONES, Administrator of the Estate
of WILLIAM HAROLD O'KELLEY, Deceased,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA**

BRIEF IN OPPOSITION

STATEMENT OF CASE

I. Introduction

Respondent agrees that Petitioner has asserted — at least in the abstract — due process and equal protection claims at all relevant stages of the litigation below. After the Court has had an opportunity to consider the procedural context of this case, however, it will note the disparity between the constitutional claims verbalized below and the constitutional claims that the Petitioner actually litigated.

While the Respondent does not question Article III standing in this case, he will suggest that the Petitioner on this

record raises constitutional claims that are so generally formulated and so lacking in theoretical focus[1] that a favorable ruling on the Petitioner's behalf would generate more doubt about the award of punitive damages in this country than it could ever hope to resolve. Moreover, such a ruling would do so without the offsetting benefit of having *in this case* a reasonable framework from which to instruct the states about how to bring the law of punitive damages into compliance with federal constitutional standards. In reality, a series of clarifying and qualifying decisions[2] from this Court would be needed at a time when its dockets are heavily burdened and state legislatures throughout the country are effectively engaged in "tort reform," an important element of which is the examination of procedures and standards associated with the award of punitive damages.[3]

Respondent further suggests that neither the timing nor the procedural context of this case makes it suitable for the granting of the Petitioner's request for certiorari. Respondent will

---

[1]Constitutional issues must be presented in clear cut and concrete form so that this Court can know exactly the elements of state law that are being called into question. *See Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 589 (1972).

[2]Perhaps the most apt illustration of this is the Court's constitutionalization of the law of defamation in *New York Times v. Sullivan*, 376 U.S. 254 (1964). In the intervening years, the Court has had to consider and decide many cases dealing with the scope of the *New York Times* rule. Tribe, *American Constitutional Law* 861-890 (2nd ed. 1988).

[3]Georgia is one of the states that has enacted tort reform measures. They became effective July 1, 1987. See O.C.G.A. §§ 51-12-1; 51-12-5.1; 51-12-12. Included among these reform measures are: (1) a requirement that punitive damages be proven by clear and convincing evidence; (2) the award of punitive damages must be rendered through a special verdict form; (3) trials involving claims for punitive damages must be bifurcated; and (4) a statutory limit of $250,000 applies to the award of punitive damages.

show that Georgia, like virtually all jurisdictions, has genuinely formidable substantive and procedural standards to protect tort defendants against the award of unfairly large punitive damage verdicts. Respondent would point out here that the Hospital Authority took tactical advantage of ***almost none*** of these protective rules in the defense of this case.[4] If the Hospital Authority is dissatisfied with the outcome in this case, its complaint is not with the law of Georgia.

II. Facts

Respondent does not intend to burden the Court with a lengthy counter recitation of the facts in this case. However, some discussion of his theory of recovery and the key testimony in support of the verdict below is necessary to put a fairer perspective on the case than Petitioner's factual summary provides.[5]

Respondent litigated this case on the theory that the Hospital Authority acted wrongfully in two respects: (1) by overruling the unanimous judgment of the EMTs at the first accident site to call for a medivac helicopter to transport Mr. O'Kelley directly to the Grady Hospital burn unit in nearby Atlanta, Georgia; and (2) by placing Mr. O'Kelley — who was helpless at the time — in a position where he was forced to depart from a parking lot at Joan Glancy Hospital by helicopter under conditions that were unsafe and were known to be unsafe by Hospital Authority officials. To elaborate briefly, when Hospital Authority officials recognized that they would have to transfer O'Kelley from Joan Glancy to the nearest burn unit — where

---

[4]In the context of federal habeas corpus litigation under 28 U.S.C. § 2254, a state criminal defendant is bound by the tactical decisions of his trial attorney. *Wainwright v. Sykes*, 433 U.S. 72 (1977).

[5]The Petitioner's statement of facts refers to some items of testimony that the jury discredited in whole or part. This Court does not sit to review questions of witness credibility or factual sufficiency.

Respondent contends he should have been taken all along — that option had been foreclosed. Joan Glancy Hospital had in fact admitted O'Kelley as a patient and, for that reason, Grady Hospital in Atlanta, which was the nearest burn unit, refused to accept the attempted referral. This made it necessary to transfer O'Kelley to a burn unit in Augusta, Georgia which is more than 125 miles from Joan Glancy Hospital. The helicopter crash in the Joan Glancy Hospital parking lot occurred in this atmosphere of confusion, mistake and haste.

Respondent will hereafter summarize the most important testimony and evidence in further support of the jury's verdict below:

1. Four persons with EMT certification were at the scene of Mr. O'Kelley's automobile accident initially. The two EMTs from the Hospital Authority arrived next. All agreed that O'Kelley needed to be transported immediately to the burn unit at Grady Hospital in Atlanta, Georgia — a 15 to 20 minute helicopter ride away. When the two Hospital Authority EMTs got to the accident site, one reiterated the need to call for a helicopter. During this brief time span, the Hospital Authority's Emergency Medical Service supervisor was in radio contact with his EMTs. Twice he instructed them to take O'Kelley to Joan Glancy instead of Grady Hospital. The first time was *before* the arrival of the EMTs at the accident. The second was to *overrule* the suggestion of one of his own EMTs — concurred in by all other EMTs at the automobile accident site — to transport O'Kelley by helicopter directly to the Grady Hospital burn unit. At this time, an emergency helicopter was in the air, only a very few minutes away, and police at the accident scene were trying to set up a landing area. The Hospital Authority's Emergency Medical Service supervisor followed these developments by radio.

2. One witness who worked as Captain in charge of the Communications Department of the Gwinnett County Fire Department testified that in his years of experience the Hospital Authority had "several hundred times" directed emergency cases to its own hospitals when other hospitals either were closer geographically or were more appropriate facilities from a medical standpoint as was the case with Mr. O'Kelley's severe burn injuries. There was testimony to the effect that revenue considerations influenced the Hospital Authority to divert emergency cases in this manner.

3. There was no *contemporaneous* medical judgment that O'Kelley needed to be taken to Joan Glancy Hospital first before being routed to the nearest burn unit. Indeed, when a staff physician learned that O'Kelley had in fact been brought to Joan Glancy, he reacted with irritation and stated: "Why was he brought here? I thought that we had talked about this."

4. Three experts testified on Respondent's behalf concerning the use of the parking lot at Joan Glancy Hospital as a helicopter landing site. All stated that it was unsafe. One described the parking lot as "an accident waiting to happen" and observed that "the departure of the helicopter was through an obstacle course of obstructions." He further stated that if the parking lot was used as a landing site, it was subject to FAA regulation and safety inspection. This expert had checked FAA records and found that the Hospital Authority had not applied to operate the parking lot at Joan Glancy Hospital as a heliport. A second expert, who had worked as Aviation Section Commander in the Gwinnett County Police Department and had served as Gwinnett County Administrator, testified not only that the parking lot at Joan Glancy was unsafe for helicopter landing and departure, but that he had specifically advised the Assistant Administrator of the Hospital Authority of his opinion several years prior to the

O'Kelley helicopter crash. These warnings were ignored and helicopters landed at Joan Glancy on a fairly regular basis thereafter.

5. Even *after* the helicopter crash at issue in this case, the Petitioner on at least one occasion has been on the verge of allowing a helicopter to land in the Joan Glancy parking lot. The incident, which occurred in the spring of 1988 only a few months before this case was tried to a jury, involved another burn victim. As in the O'Kelley case, the EMTs at the scene apparently wanted to evacuate the victim to the Grady Hospital burn unit in Atlanta. Quite by coincidence, a police officer who had been present at the scene of the O'Kelley helicopter crash was present in the Joan Glancy emergency room. One of the physicians on duty there ordered the burn victim to be brought to Joan Glancy. This police officer, who testified for Respondent, screamed out "No" and, immediately afterwards, a nurse screamed out "No" as well. The burn victim was more fortunate than Mr. O'Kelley. She was taken directly to the Grady Hospital burn unit as Mr. O'Kelley should have been.

Respondent argued to the jury that these circumstances were "aggravated" within the meaning of O.C.G.A. § 51-12-5 and more particularly that the Hospital Authority's actions imperiled Mr. O'Kelley's life — already very much in danger — and did so under circumstances evidencing a *conscious* disregard for the threat to Mr. O'Kelley's well being. Though the testimony at trial was in sharp conflict on many points, the jury credited the Respondent's evidence and returned a verdict against the Petitioner and its co-defendant Metro Ambulance Services, Inc. Despite the Petitioner's vigorous attempt to cast the blame for the parking lot crash on the helicopter pilot, the jury held the Petitioner almost exclusively responsible for the aggravating circumstances present in this case and awarded punitive damages against the Petitioner

in the amount of $1,300,000. The punitive damages verdict against Metro Ambulance Services, Inc. was only $5,000.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Due Process Argument

Petitioner's due process challenge to O.C.G.A. § 51-12-5 has two components. The first is that the threshold legal standard for the award of punitive damages in Georgia and in virtually every other jurisdiction in the United States is unconstitutionally vague. The second is that even if the threshold standard for the award of punitive damages in Georgia can withstand attack, the standard for limiting the size of punitive damage awards is unconstitutionally vague and can be struck down independently. The Respondent contends that the Georgia Supreme Court below applied the correct federal constitutional standards and decided the due process challenge to O.C.G.A. § 51-12-5 in a manner fully consistent with those standards.

A. The Threshold Standard for the Award of Punitive Damages Is Not Unconstitutionally Vague.

Under Georgia case law, as the court below held, a jury can award punitive damages only if it finds "wilful misconduct, malice, fraud, wantonness or oppression or that entire want of care that raises a presumption of a conscious indifference to consequences." *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 761, 386 S.E.2d 120, 124 (1989). Throughout the litigation of the case below, the Petitioner contended forcefully that this standard was unconstitutionally

vague — that a properly instructed jury could not intelligently and fairly apply it to the facts of the case at hand. In rejecting this contention, the Georgia Supreme Court correctly recognized that *Village of Hoffman Estates v. Flipside,* 455 U.S. 489 (1982) established the governing standard for resolving vagueness challenges to statutes imposing *civil* rather than criminal penalties. This standard is less exacting than the vagueness standard applicable in criminal statutes. Of particular relevance to *this* case was the statement in *Hoffman Estates* that where a scienter requirement is an element of proof in the enforcement of a civil penalty, the existence of that requirement would save an otherwise vaguely written statute from invalidation. *Id.* at 499-500.

When the Georgia Supreme Court ruled in this case, it found at a minimum that the "conscious indifference to consequences" standard was tantamount to a scienter requirement and as such it nullified the Petitioner's facial attack on O.C.G.A. § 51-12-5. Certainly, under this standard the Petitioner had a full and fair opportunity to develop its contentions before the jury concerning the *degree of risk,* if any, created as a result of the Hospital Authority's decisions and actions. It had a similar opportunity to convince the jury that, however much blame the Hospital Authority might have to accept for what happened to Mr. O'Kelley, the agents and employees of the Hospital Authority did not exhibit a *conscious* indifference to his well being. Respondent submits that the Petitioner tenaciously litigated these factual issues. The jury in this case, however, did not credit the defense offered on behalf of the Petitioner. The Petitioner's real complaint here is not with the law of Georgia; it is with the jury's assessment of the facts. This Court, of course, does not sit to undertake *de novo* review of jury determinations of witness credibility and fact. For this reason, a grant of the writ of certiorari on this aspect of the Petitioner's due process claim would be inappropriate.

An alternative way of evaluating the Petitioner's vagueness challenge to the "conscious indifference to consequences" standard is to compare it to liability standards that apply in other legal settings. For example, in Georgia *criminal* negligence is defined as "reckless conduct such as shows indifference to the injurious result of negligent acts, an indifference to the safety of others, and a lack of consideration for their welfare." Vol. 2 *Suggested Pattern Jury Instructions* 32 (Council of Superior Court Judges of Georgia; 1984). This instruction has never been successfully challenged on vagueness grounds.[6]

A recommended federal jury instruction for "actual malice" in defamation actions involving public figures and media defendants provides: "A publication is made with 'actual malice' if it is made with knowledge that it is false, or with reckless disregard of whether it is false or not." Vol. 3 Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions*, § 84.09 (1987). Interestingly, the Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964) from which this standard derived has been applauded as an *advance* in the protection of the first amendment rights of the press. It is surely no less vague than the Georgia standard for the award of punitive damages. It is worthy of note that the *New York Times*

[6]To pursue this comparison one step further, consider the Model Penal Code definition for criminally reckless conduct. In section 2.02(c), the Model Penal Code provides: "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." While the precise language of section 2.02(c) is different from the "conscious indifference to consequences" standard, both define a similar level of culpability and do so with reasonable clarity. Neither is subject to serious constitutional challenge on vagueness grounds.

actual malice standard is not only constitutional; it is constitutionally *required* under current first amendment principles.

Finally, in the context of litigation under 42 U.S.C. § 1983, the Supreme Court has sustained a jury instruction concerning the award of punitive damages which provides: "[I]f the conduct of one or more of the defendants is shown to be a *reckless or callous disregard of, or indifference to, the rights or safety of others,* then you may assess punitive or exemplary damages in addition to any award of actual damages." *Smith v. Wade,* 461 U.S. 30, 33 (1983) (emphasis supplied by Court). Although the decision in *Smith v. Wade* was split 5-4, the difference between the majority and the dissenters was over the proper reading to be given to section 1983 in light of its legislative history and considerations of public policy. No weight was given to *constitutional* considerations such as vagueness in the decision of the case.

In many areas, the law is built upon general standards and it could not function otherwise. This is particularly true at the state level where the primary responsibility for the enforcement of common law principles resides. The judicial process is the mechanism through which the generalities of the law are brought to bear in individual cases. The role of effective advocacy in this process is, of course, critical. As long as the law is specific enough to inform the jury about what is at stake legally, the presentation of evidence and argument by counsel in light of the general legal standard is sufficient to satisfy due process requirements of notice and fair play. When the jury in the present case awarded punitive damages against the Petitioner, it understood fully what it was doing and why. The Petitioner was not disadvantaged by the supposed generalities of the "conscious indifference to consequences" standard.[7]

[7]The case law standard, which the Petitioner challenges as unconstitutionally vague, was *codified* as a part of Georgia's tort reform package effective July 1, 1987. *See* O.C.G.A. § 51-12-5.1(b).

The Petitioner has not cited a single punitive damages decision, either state or federal, in support of its vagueness argument. There is no conflict among the state courts or the federal circuit courts. None of the customary criteria for the grant of certiorari is present in connection with this aspect of the Petitioner's due process argument.

B. The Standards Limiting the Size of Punitive Damages Awards Are Proper in Conception and Clear in Legal Formulation.

The second component of the Petitioner's due process challenge to O.C.G.A. § 51-12-5 suffers from the same flaws described in the preceding section and in addition is based on a procedural record barely adequate to show standing to raise the issue. According to the Georgia Supreme Court below, if a jury decides to award punitive damages, it is subject to a number of substantive constraints on the size of the award that it is authorized to return. *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 764 n. 13, 386 S.E.2d 120, 124 n. 13 (1989).

First and foremost, a punitive damages award must be for the sole purpose of deterring the wrongdoer, not third parties, from repeating the wrong. Second, the jury can consider the following factors in fixing the amount of punitive damages to be awarded: (1) the egregiousness of defendant's conduct; (2) the extent and duration of the wrong and the possibility of its recurrence; (3) the defendant's intent; (4) the profitability of the defendant's wrongdoing; (5) the amount of actual damages awarded; (6) previous awards of punitive damages, if any, against the defendant arising from the same conduct; (7) potential or prior criminal sanctions against the defendant based on the same wrongful act; and (8) any other pertinent circumstances. Id. 259 Ga. at 760-66, 386 S.E.2d 122-26.

Finally, jury verdicts which appear to be based on gross mistake or undue bias can be set aside by the trial judge. O.C.G.A. § 51-12-12. Some or all of these factors are used to structure jury discretion in the award of punitive damages in many jurisdictions. 1 Callaghan, *Punitive Damages Law and Practice* § 3.03.

To put the point as civilly as possible, Petitioner's contention that the only limit in Georgia on the jury's authority to award punitive damages is the "enlightened conscience of the community" is simply wrong. The Petitioner in substance wants to attack O.C.G.A. § 51-12-5 without acknowledging the authoritative judicial interpretations that have been given to that provision. Nowhere in the petition for certiorari is there even an acknowledgement of the factors considered by the Georgia Supreme Court to be relevant to the jury's exercise of discretion in setting punitive damages. Nowhere is there a challenge to the relevance or the propriety of using any one of these factors in the jury's deliberations on punitive damages. Frankly, Respondent does not know what the Petitioner expects this Court to review. Supreme Court Rule 14.5 provides as follows: "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition [for certiorari]." It is surely applicable here.

If needed, there are additional reasons to deny the petition for certiorari on this question. Consider what the Petitioner did *not* do tactically and procedurally in this litigation to respond to the Respondent's demand for punitive damages. Upon a consideration of these choices, the Court will be hard pressed to believe that the Petitioner in this case has suffered an injustice because of the alleged constitutional flaws of O.C.G.A. § 51-12-5 and the decisions construing it.

1. Petitioner did not request a bifurcated trial which it had the right to seek under *Moore v. Thompson*, 255 Ga. 236, 336 S.E.2d 745 (1985). This procedure has many advantages for tort defendants. Foremost among them is the fact that a tort defendant can aggressively oppose liability without compromising its ability to argue, if necessary, against a request for a substantial award of punitive damages. At the damages phase, a tort defendant can introduce evidence that it would be hesitant to offer in a trial where both liability and punitive damages are determined in a unitary proceeding. In the context of the trial below, had it been bifurcated, the Petitioner could have developed several matters at the damages phase. It could have elaborated on the meaning and significance of its claim to non-profit status.[8] Since vicarious liability was involved, the Petitioner could have shown whether disciplinary action was taken against the employees directly responsible for the handling of the O'Kelley case. Finally, the Petitioner could have offered proof of subsequent remedial measures such as the construction of a safe helicopter landing site as well as the formulation of better procedures for routing emergency cases by ambulance to the most appropriate hospital. As the case was actually tried, however, the Petitioner presented almost no evidence in mitigation of punitive damages.

2. Although the Petitioner challenged the trial court's instruction on punitive damages, it did not offer any special instructions designed to focus the jury's consideration of this issue. In light of the factors mentioned earlier, a charge request of this nature would have been most helpful

---

[8]The Supreme Court of Illinois has pointed out that the *plaintiff* in a case involving an award of punitive damages is under no obligation to present evidence of the *defendants'* financial condition. *Deal v. Byford*, 537 N.E.2d 267, 272 (Ill. 1989).

to offset the disadvantage to the Petitioner resulting from its failure to request a bifurcated trial.[9]

3. After the trial, the Petitioner filed a motion for judgment n.o.v. or, in the alternative, a motion for new trial and remittitur. It preserved its constitutional claims in a *pro forma* manner, but did not seek to offer any evidence to substantiate its contention that the punitive damages award was unconstitutionally excessive. As the Georgia Supreme Court pointed out below, the trial judge sometimes functions as the thirteenth juror. *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 765, 386 S.E.2d 120, 125 (1990). In this capacity, the trial judge has a significant degree of control over damage awards. O.C.G.A. § 51-12-12. In addition, the trial judge has very broad authority to grant a request for a new trial. O.C.G.A. § 5-5-20. This, too, can serve as a check on excessive damage verdicts because the trial judge can make an order for a new trial conditional upon the plaintiff's willingness or unwillingness to accept remittitur. Since the Petitioner did not request a bifurcated trial in this case, one might have expected an all-out attempt to appeal to the trial judge through post-trial motions. The record, however, does not reflect that.

4. Finally, the Georgia Supreme Court below emphasized that the appellate courts could set aside excessive damage awards even if the trial court did not see fit to do so under O.C.G.A. § 51-12-12. *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 766, 386 S.E.2d 120, 126 (1989). While admitting that appellate reversals of damage awards are not an everyday occurrence, it made clear that the safeguard was a substantial one. *Id.* In this vein, this Court should be aware

[9]In *Palmer v. A.H. Robins, Co., Inc.*, 684 P.2d 187, 219 (1984), the defendant's failure to request an instruction on *factors* governing the award of punitive damages barred appellate review. The defendant in *Palmer* challenged the adequacy of the jury instructions at trial but offered none of its own that would have cured the defects raised on appeal.

that the Georgia Supreme Court recently exercised its authority to set aside an award of punitive damages in a major case. *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988) (plurality opinion). In the present case, the Georgia Supreme Court reviewed the entire record in light of the standards enunciated in its opinion. It concluded:

> [U]nder the circumstances presented, the trial judge did not abuse its discretion in refusing to overrule the jury's punitive damage award. Nor, do we find the judgment so excessive as to be unconstitutional. 259 Ga. at 766, 386 S.E.2d at 126.

Respondent recognizes that some members of this Court have expressed concern about the clarity of the legal standards used to limit the size of punitive damages awards in civil cases. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, _____ U.S. _____, 109 S. Ct. 2909, 2923-24 (1989). No doubt the laws of some states have specific flaws that are of sufficient importance nationally to justify the exercise of jurisdiction by this Court. But the law of Georgia concerning the award of punitive damages would appear to be reasonably calculated to produce fair outcomes. It preserves the basic right to trial by jury in tort cases, but at the same time recognizes that lay persons on the jury need some guidance to decide whether to award punitive damages in the first place and, if so, in what amount. The procedural framework, particularly the right to request a bifurcated trial, and the substantive factors that guide the jury give tort defendants in Georgia many tools to influence the jury's perception of the need for punitive damages in a given case. The jury's decision, of course, is not final. If it reaches a verdict that is demonstrably excessive, both the trial and appellate courts have ample authority to set aside unlawful and unjust punitive damage awards. *See, e.g., Colonial Pipeline v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988).

Within this framework, the Petitioner did not fare well. But, the Petitioner's distaste for the outcome below does not readily transform this case into an example of the evil of a runaway jury eager to dip into the deep pocket of a wealthy, but hapless defendant. This certiorari petition represents the last hope of the Petitioner in its quest to avoid liability for its involvement in Mr. O'Kelley's tragedy. At this juncture, the case is truly a dispute between the parties without any national import. Certiorari should not be granted on this aspect of the due process issue as well.

II. Equal Protection Argument

When this case first began working its way through the appeals process, a decision had not yet been rendered in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, _____ U.S. _____, 109 S. Ct. 2909 (1989). Of course, the contention under consideration in *Browning-Ferris* was whether punitive damages are the constitutional equivalent of criminal fines and hence subject to control under the excessive fines clause of the eighth amendment. This Court rejected the proffered analogy. It emphasized that given the background of the eighth amendment, the excessive fines clause establishes a limit on the power of *government* to impose and collect fines. The clause was not intended as a control on the jury.

The Petitioner resorts to the legerdemain of equal protection analysis to try to repackage the analogy rejected by this Court in *Browning-Ferris*. In fact, the Petitioner's theory here is even *broader* than the contention in *Browning-Ferris*. Simply put, the Petitioner argues along the following lines: because the deterrence purpose of punitive damages in civil cases overlaps with a penal objective of the criminal law, the constitutional safeguards available to criminal defendants at trial

should be similarly available to tort defendants subject to the *possible* award of punitive damages.

Perhaps because the argument has truly breathtaking ramifications, the Petitioner trims it back a bit toward the end of the equal protection section of its petition when it appears willing to settle for the reasonable doubt standard and double jeopardy in cases involving punitive damages. Petition for Certiorari at 23. At the same time, the Petitioner neglects to mention the safeguards available under Georgia law as it now stands that it did *not* employ at trial. In passing on this argument, the Respondent would ask this Court to reflect on two questions. How was the Petitioner disadvantaged by the preponderance of evidence standard in this case when it chose to put on no evidence in mitigation of punitive damages? Why is the double jeopardy principle relevant to this case when the record does not reflect multiple punishment in the form of duplicative awards of punitive damages?

No court that Respondent is aware of has ever accepted an equal protection argument like the Petitioner's. Few, if any, have ever taken it seriously.[10] In essence the Petitioner would like to have this Court render an advisory opinion on the law of punitive damages through the medium of equal protection analysis. It would be difficult to imagine a question more ill-suited for consideration by this Court. The grant of certiorari on this issue would be a waste of limited time on the oral argument calendar.

---

[10]This argument has been made on equal protection as well as due process grounds. Neither formulation has been persuasive. *See, e.g., Olson v. Walker*, 781 P.2d 1015 (Ariz. App. 1989); *Downey Savings & Loan Ass'n. v. Ohio Casualty Ins. Co.*, 189 Cal. App.3d 1072, 234 Cal. Rptr. 835 (1987); *Unified School Dist. No. 490 v. Celotex Corp.* 6 Kan. App.2d 346, 629 P.2d 196 (1981); *Sturm, Roger & Co. v. Day*, 594 P.2d 38 (Alaska 1979).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

*Robert D. Cheeley
James E. Butler, Jr.
Butler, Wooten, Overby
& Cheeley
Resurgens Plaza
Suite 1790
945 East Paces Ferry Road
Atlanta, Georgia 30326
(404) 237-9660

Attorneys for Respondent

**Counsel of Record*